EON BANK BHD

v.

EMAS KEJURUTERAAN SDN BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[ORIGINATING SUMMONS NO: 24-68-1999]
26 FEBRUARY 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether shown - Whether chargee's claim statute-barred - When cause of action accrued - Whether upon chargor's default in repayment - Whether only upon chargee's notice of demand - Whether chargee's claim for interest proper - National Land Code, s. 256(3) - Limitation Act 1953, s. 21(1), (5)*

LIMITATION: *Accrual of cause of action - Application for order for sale - Whether statute-barred - When cause of action accrued - Whether upon chargor's default in repayment of loan - Whether only upon demand for repayment of amount owing to chargee - Limitation Act 1953, s. 21(1), (5)*

This was an application ('the application') by the plaintiff bank under s. 256(3) of the National Land Code ('the Code') for an order for sale in respect of a piece of land charged by the defendant to it as security for a term loan. The defendant had earlier defaulted in the repayment of the said loan which was disbursed to it on 16 June 1986. The plaintiff's notice of demand was issued on 17 November 1998 and the application was filed on 26 May 1999. The defendant resisted the application on the ground that it was statute-barred pursuant to s. 21(1) of the Limitation Act 1953 ('the Act'). It was contended that the cause of action accrued on the date of the default in the repayment, *ie*, 30 June 1986. The defendant also contended that the plaintiff's claim for interest was in excess of the six years allowed under s. 21(5) of the Act. The plaintiff argued, conversely, that the cause of action accrued after the date of its demand, *ie*, 17 November 1998.

Held:

[1] Under the loan agreement and charge annexure, the principal amount of the loan and the interest thereon would only become due upon the plaintiff issuing a notice of demand to the defendant. Thus the defendant's liability to repay the amount owing only arose after 17 November 1998. Consequently, the filing of the application on 26 May 1999 was well within the 12-year limitation period prescribed by s. 21(1) of the Act. (p 248 f-i)

[2] Proviso (b) to s. 21(5) of the Act was applicable in the present case. (p 249 a-d)

[3] The defendant was unable to show the existence of any cause to the contrary within the meaning of s. 256(3) of the Code. (p 249 h)

[Sale ordered.]

Case(s) referred to:
Bank Pertanian Malaysia v. Mohd Ghazali Mohd Ismail [1997] 3 CLJ Supp 299 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***
Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 ***(dist)***
Perwira Affin Bank v. Lim Weow [1998] 4 CLJ 17 ***(refd)***
United Malayan Corp v. Yap Peng Wai [1998] 5 MLJ 511 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 21(1), (5)(b)
National Land Code, s. 256(2), (3), (4)(b)

For the plaintiff - Parimalar Selvarajah; M/s AI Nathan Assoc
For the defendant - Mohd Badrol Hj Mohamed Taib; M/s Abdullah, Abd Rahman & Co

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim J:
The plaintiff bank applied for an order for sale pursuant to s. 256(3) of the National Land Code 1965 (the Code) of a piece of land held under HS(D)1102 Lot PT 610K Mukim Bandar Kuala Terengganu (the land) charged by the defendant to the plaintiff as security for a term loan of RM410,000 which was granted to the defendant for working capital for its building contractual works. The loan was disbursed on 16 June 1986.

The defendant defaulted to repay the loan and the plaintiff through its solicitors issued a notice of demand dated 17 November 1998 demanding the sum of RM1,229,389.86 as at 20 October 1998. Since no payment was effected, the plaintiff filed an originating summons on 26 May 1999 praying for an order for sale of the charged land by public auction to settle the sums outstanding respecting the principal and the arrears of interest up to the date of actual payment.

In his affidavit in reply, the defendant, while admitting that it had not paid the outstanding sums claimed by the plaintiff, opposed the application on the ground that the plaintiff's action is statute barred pursuant to s. 21(1) of the Limitation Act 1953 (the Act). Learned counsel for the defendant submitted that by the provisions of the loan agreement and the charge annexure, the right to receive the whole principal sum and interest dates back to the date of default in payment of the interest from 30 June 1986. And since the action was filed on 26 May 1999 ie, after 12 years 10 months from 30 June 1986, and the notice of demand was issued on 17 November 1998 ie, after 12 years four months from 30 June 1986, the action is now statute barred and therefore

cannot be entertained. The defendant's counsel also argued that the plaintiff's claim for the interest from 16 June 1986 up to 25 May 1999 for a period of 12 years 11 months contravenes s. 21(5) of the Act which allows interest to be claimed up to six years from the date on which the interest became due. He further submitted that the proviso (b) to s. 21(5) is not applicable in the instant case as there are no provisions in the charge annexure and the loan agreement which say that future interest or any arrears of interest shall be treated as part of the principal sum of money secured by the charge. Therefore, he prayed that the plaintiff's application for an order for sale be dismissed with costs.

Learned counsel for the plaintiff, on the other hand, maintained that the plaintiff's action dated 26 May 1999 is still within the limitation period of 12 years as the plaintiff's cause of action accrues after the demand was made on 17 November 1998 and that the defendant failed to settle the outstanding sums owed. With regard to the interest, counsel said that the proviso (b) to s. 21(5) of the Act is applicable and as such, she urged the court to dismiss the defendant's objections and prayed that the plaintiff be given order in terms.

Therefore, in order to decide whether the plaintiff's action is statute barred or not, it is necessary to identify when did the plaintiff's cause of action against the defendant accrue.

The provisions relating to limitation of actions to recover money secured by a charge is provided by s. 21 of the Act which reads as follows:

> (1) No action shall be brought to recover any principal sum of money secured by a ... charge on land ... or to enforce such ... charge .... after the expiration of twelve years from the date when the right to receive the money accrued.
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (5) No action to recover arrears of interest payable in respect of any sum of money secured by a ... charge ... shall be brought after the expiration of six years from the date on which the interest became due:
>
> Provided that –
>
> (a) ...
>
> (b) Where the property subject to the ... charge comprised any future interest ... and it is a term of the ... charge that arrears of interest shall be treated as part of the principal sum of money secured by the ... charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

It is provided under s. 7.01 – Repayment on demand – of the loan agreement that:

> The whole of the principal amount of the loan and interest thereon any other moneys covenanted to be paid by the borrower under this agreement shall become due and immediately repayable **on demand**. (emphasis is provided)

Clause 8.02 – Repayment on demand – of the charge annexure states:

> ... A demand for payment of the principal amount of the loan together with interest thereon may be made by notice demanding payment within seven (7) days from the date of notice ...

Whereas cl. 8.03 – Breach of Covenants – of the charge annexure states:

> The chargor shall, for the purpose of section 8.01 hereof, be deemed to commit a breach of the agreements, covenants, terms, stipulations and undertakings herein provided upon the happening of any of the following events:
>
> (a) if the chargor fails to repay the whole amount due after expiry of the notice of demand referred to in section 8.02 ... .

Thus, pursuant to the provisions of the loan agreement and the charge annexure, the plaintiff had made the demand against the defendant by way of a letter of demand through the plaintiff's solicitors dated 17 November 1998 wherein the defendant was given a time period of seven days to pay the outstanding sums, and also by issuing Form 16D on 11 January 1999.

It is to be noted that the present action is a foreclosure action to recover money secured by charge and thus the applicable law relating to limitation of actions is s. 21 of the Act which provides that the action should be instituted within the period of 12 years when the right to receive the money accrued. Hence, by the clear provisions of the loan agreement and the charge annexure, the defendant's liability to pay the amount owing only arises after the said letter of demand dated 17 November 1998 was issued. Since the defendant had failed to pay the sums outstanding, the plaintiff's cause of action therefore accrues after the expiry of seven days notice of demand dated 17 November 1998 when the defendant failed to do so and not on 30 June 1986 as contended by the defendant. (see *Bank Pertanian Malaysia v. Mohd Ghazali bin Mohd Ismail* [1997] 3 CLJ Supp 299; *United Malayan Corp v. Yap Peng Wai @ Yap Peng Hooi* [1998] 5 MLJ 511; *Perwira Affin Bank v. Lim Weow* [1998] 4 CLJ 17 CA). Obviously therefore, the institution of the plaintiff's action on 26 May 1999 is well within the 12 years period as prescribed under s. 21(1) of the Act.

As to the case of *Nadefinco Ltd v. Kevin Corporation Sdn. Bhd.* [1978] 2 MLJ 59 FC which was relied by the defendant, I hold that that case has no application to the facts of the plaintiff's case. Unlike in the present case, there, there is no provision 'on demand clause'. Therefore, the accrual date of the cause of action in that case rightly begins six years from the date of payment of the first instalment.

Regarding the claim for arrears of interest, I, with respect, agree with the learned counsel for the plaintiff that the proviso (b) to s. 21(5) of the Act is applicable to the present case. In the present case, there are provisions in the charge and charge annexure whereby arrears of interest has to be treated as part of the principal sum of money secured by the charge and the interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued. In the instant case, Form 16A of the Code stated "untuk menjamin pembayaran wang pokok" (To secure payment of a principal sum). The defendant, as registered proprietor of the charged land, covenanted to pay the chargee the sum of RM410,000 'berserta faedah' (together with interest) (see *Bank Pertanian Malaysia, supra*). Thus, it would appear that the charge comprises future interest and by the express mention of the word 'faedah' (interest) in the charge in the form prescribed for payment of the principal sum, the interest mentioned therein is therefore to be treated as part of the principal sum secured by the charge. Since the principal sum has not accrued until the expiry of 17 November 1998 notice of demand, likewise, the interest is not due until such date. Hence, the right of the plaintiff to recover the arrears of interest has not extinguished as the act of recovery was made only six months later on 26 May 1999, when the plaintiff's action was instituted, a date well within the six years limitation period.

In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, the Supreme Court stated that in an application for an order for sale under s. 256(3) of the Code, the High Court is entitled to refuse an order for sale of charged property once it is satisfied of the existence of cause to the contrary by:

(i) demonstrating that the charge is defeasible upon one or more of the grounds specified under sub-ss. (2) and (4)(b) of the said s. 256;

(ii) demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as failure to make a demand or service of a notice in Form 16D, or that the notice demands sums not lawfully due from the charge;

(iii) demonstrating that its grant would be contrary to some rule of law or equity.

Applying the above principles to the present case, I find that the defendant has failed to show the existence of any cause to the contrary under s. 256(3) of the Code towards the plaintiff's case. I hold that the plaintiff's action is not statute barred. In fact, as rightly pointed out by the plaintiff's counsel that the defendant has in the para. 5 of its affidavit in reply which was affirmed on 29 July 1999 admitted that the defendant had not made any payment to the plaintiff.

Clearly, the defendant's objection has no merit. As such, I dismiss the defendant's objection with costs and allow the plaintiff's application for an order for sale as prayed.